

THE GEORGE WASHINGTON UNIVERSITY  
Washington, DC

MINUTES OF THE REGULAR MEETING  
OF THE FACULTY SENATE HELD  
ON DECEMBER 10, 1999, IN THE  
ALUMNI HOUSE, 1925 F STREET NW

The meeting was called to order by Vice President Lehman at 2:15 p.m.

Present: Vice President Lehman, Registrar Selinsky, and Parliamentarian Pagel:  
Deans Futrell and Lefton; Professors Agnew, Berkowitz, Boswell,  
Cawley, Duff, Gallo, Griffith, Harrington, Johnston, McAleavey, Moses,  
Nagy, Park, Pelzman, Robinson, Sheldon, Stephanic, and Wilmarth

Absent: President Trachtenberg, Deans Harding, Mazzuchi, Phillips, Riegelman,  
Williams, and Young; Professors Captain, Castleberry, Granger, Haque,  
Mergen, Paratore, Simon, and Zaghloul

INTRODUCTION OF NEW SENATE MEMBER

Vice President Lehman introduced a new member of the Senate, Michael Moses, Associate Professor of Mathematics, Columbian School of Arts and Sciences. Professor Moses succeeds Professor Packer, who left the University.

APPROVAL OF THE MINUTES

Vice President Lehman called for approval of the minutes of the regular meeting of November 12, 1999. Professor Nagy asked that the minutes be amended on Page 3, Paragraph 2, Line 7, by replacing the words "... the CEO of AETNA pays himself \$123 million a year. . ." with the words "according to USA Today, Thomas Frist, CEO of HCA, made a profit of \$125.9 million on stock options in 1992. . . ." No objections were made to the amendment, and the minutes, as amended, were approved.

RESOLUTIONS

I. RESOLUTION 99/2, "A RESOLUTION TO AMEND THE 1996 FACULTY CODE OF THE GEORGE WASHINGTON UNIVERSITY"

Professor Harrington, Chair, Professional Ethics and Academic Freedom Committee, said that the Committee was very happy to present this Resolution to the Senate and he hoped the Senate would find it acceptable. He said that the Committee had received the excellent Report of the Ad Hoc Committee, chaired by Professor Mary M. Cheh, in October 1997, and the PEAFC Committee has been working very hard since that time to complete its work and

bring this Resolution to the Senate. He said that he thought the proposed changes in the grievance procedures would streamline the whole process extremely well. He then called upon Professor Johnston, Chair of the Subcommittee of the PEAFC Committee, to explain the major changes in the document.

Before proceeding, Professor Johnston, on behalf of Vice President Lehman and Mr. Richard Weitzner of the General Counsel's Office, distributed two amendments--Amendment #1 to Section 6. Remedies, and Amendment #2 to Section 7. Final Disposition. (The amendments are attached.)

Professor Johnston noted that the Cheh Committee went through an in-depth study of the grievance procedures over the last 25 to 30 years and recommended changes which were in the nature of speeding up the process and also codifying things that had been common law practice. The PEAFC Committee posed the question, "The grievance procedures are for whom?" And the Committee concluded that since the procedures are relied upon by faculty, hopefully a better process would benefit the faculty, but they also concluded that it would benefit the administration, as well. If faculty members think that they will be getting a "fair shake" by going through the University's process, then they will be less likely to go to court as an alternative, thereby saving the University money in terms of damages and expensive legal fees. He then described the major changes in the grievance procedures recommended by the PEAFC Committee, as follows:

(1) Change the word "complaint" to "grievance" and the word "complainant" to "grievant."

(2) 3. Preliminary Proceedings (pp.3-4) Remove the Executive Committee in terms of having a substantive responsibility though continuing to be advised of the proceedings. Appointment of a special mediator by the Dispute Resolution Committee, unless the University or the aggrieved party objects.

(3) 4. Formal Proceedings a) Commencement of Proceedings (p.4) Restore current Faculty Code language, inadvertently omitted, but should have been shown as stricken. A grievance may only be maintained against the University for official acts, not against faculty members of the University, acting in their individual capacities as faculty members.

(4) 4. Formal Proceedings b) Hearing Committee and Hearing Officer (p.5) Designation of one member of the 3 members of the Hearing Committee to be the Hearing Officer. The Chair of the Dispute Resolution Committee shall decide any challenges for cause, based on written submission from the parties.

(5) 6. Remedies (p.10) A Hearing Committee and the Dispute Resolution Committee may not include as part of their recommendations any damages for nonpecuniary losses, punitive damages, or any other actions or measures outside of the scope of the underlying University action being challenged.

(6) 7. Final Disposition (p.10) In the absence of a timely appeal filed by either party, the decision of the relevant Committee (Hearing Committee or Dispute Resolution Committee) shall be deemed final and shall be implemented by the University unless the Vice President for Academic Affairs determines that the relevant Committee's decision is clearly erroneous and should not be implemented.

With regard to the inclusion of the "clearly erroneous" standard recommended by the PEAFC Committee, Professor Johnston said that the Committee was looking for an appellate type of standard. Although the Committee considered other alternatives, including compelling reasons, it found that when one is talking about findings of fact, it is the Hearing Committee that actually hears testimony and evidence. And the Hearing Committee puts a good deal of emphasis on their fact-findings and determinations. In addition, compelling reasons, he said, is not a very good legal term because one cannot look at case law and determine what "compelling reasons" means.

Professor Griffith expressed his thanks to Professor Johnston and the PEAFC Committee, and to Professor Cheh, for their major contributions to attempt to clarify remedies and final disposition which had really been left unspecified in earlier versions. Professor Wilmarth also extended his appreciation to Professor Cheh, Professor Johnston, and the PEAFC Committee for their hard work.

Professor Wilmarth suggested a "friendly amendment" to the second sentence of Section 4a)2) (p.4) to insert the words "or as members of the Faculty Senate" after the words "... acting in their individual capacities." This would provide some notion of a collective faculty body, as well as individual capacities, he explained. Professors Johnston and Griffith both spoke against the amendment.

With reference to Section 6. Remedies, Professor Griffith asked if that language excludes recommending attorney's fees if the University were found clearly in the wrong. Professor Wilmarth said that it was questionable. The normal presumption is that attorney's fees are not recoverable, but the language does not completely exclude it.

Further discussion followed by Professors Park, Griffith, Boswell, Johnston, and Wilmarth.

Professor Park said that it seemed to him that the opportunity losses of not getting a position or a research grant or some other benefit of University employment is one of the things that is most likely to be the basis of a grievance. He then offered to amend Section 6. Remedies by adding the following language: "Pecuniary damages beyond actual or opportunity losses to the grievant as a University employee." Professor Wilmarth suggested adding the words "of a financial nature" after the words "opportunity losses." Professor Park accepted Professor Wilmarth's suggestion.

Vice President Lehman said that he did not think it is a positive thing to involve grievance committees in situations where they have hearings over possible remedial measures. If a grievant prevails, remedial measures are obvious, and he could not think of any instance over time that he was familiar with that this had ever led to a problem. Professor Pelzman argued that the problem is not only lost wages, but lost opportunity costs in the sense of being able to compete for grants or other kinds of awards while the grievance process is going on. If the grievant wins and the University has been wrong in its case, then, he said, there is some logic for compensation of the grievant. Professor Boswell asked Vice President Lehman that if a grievant prevails, and if the remedies are taken out of the hands of the Hearing Committee and left in the hands of the administration, would the administration consider monetary damages in a variety of ways? Vice President Lehman replied that the administration does that on a regular basis already. Professor Griffith said that he thought that if the Senate makes the grievance system too unfriendly to the grievant, we force more people to court and, on other other hand, we do not want to make it completely unfriendly to the administration. Therefore, he thought the PEAF Committee language about nonpecuniary losses is a reasonable compromise.

Further discussion followed by Professors Johnston, Nagy, Pelzman, Boswell, and Griffith.

Referring to the amendment to Section 6. proposed by the administration to change the title "Remedies" to "Recommendations," Professor Park said that he thought that change would be clarifying in a very useful way, because the Hearing Committee is not to make a decision on remedies, but essentially to make recommendations. Mr. Weitzner said that he agreed that the language uses recommendations. However, Section 7 talks about final disposition, and it does not make a distinction between findings and recommendations in terms of a standard of review under the current proposed language. The administration would have to accept a committee's findings as to remedy unless it was found to be clearly erroneous. That elevates it much more than just a recommendation that the administration could accept or disregard, he said. Professor Pelzman said that the clearly erroneous standard is correct; anything else gives the administration too much. That is the standard at the appellate level. While it is still a recommendation, the administration can still deny it, but it must be substantiated. Professor Johnston said that he could live, personally, with substituting "recommendations" for "remedies," but then he thought it becomes all the more important to have a "clearly erroneous" standard because, otherwise, the administration can review a grievance de novo.

Further discussion followed by Professors Park, Griffith, Robinson, and Pelzman.

Professor Wilmarth moved Amendment No. 1 proposed by the administration, as an accommodation to the administration, stating that he did not support it and thought that the existing language should be retained. The motion was seconded. Professor Park asked that the question be divided. The question was called on the text of Section 6. Remedies proposed by the administration. The amendment failed. The question was then called on the



proposed amendment to change the title of Section 6. from "Remedies" to "Recommendations." The amendment failed.

Turning to Amendment No.2 proposed by the administration to Section 7. Final Disposition, Vice President Lehman called upon Mr. Weitzner to speak to it. Mr. Weitzner said that the first part of the amendment would distinguish the standard of review, i.e., there is a somewhat lesser standard of review for recommended remedies than there would be for findings of fact. As the amendment reads, findings of the committee would be adopted unless there were compelling reasons not to adopt them. That standard, he said, is consistent with the standard used in nonconcurrency cases and was also the recommendation of the Cheh committee. The second part goes to the standard for reviewing a recommended remedy. Under the amendment, the Vice President would give "strong consideration to the relevant committee's recommendation." Other changes, he said, are the use of the words "findings and recommendations" in place of "decision" because elsewhere in the Code that is how the committee's decision is defined. Therefore, for consistency purposes, we make that distinction in the final disposition that the committee is making "findings and recommendations."

Professor Griffith, noting the administration's preference for the standard of compelling reasons, asked Mr. Weitzner if the General Counsel's Office did an analysis of the interpretation given to compelling reasons in nonconcurrency cases. Mr. Weitzner replied that his office had not made any kind of formal analysis. He said that they have asked for specific data because Professor Johnston has raised concerns that, in his view, the compelling reasons standard has eroded over time, but the administration does not believe that that has been the case. He noted that the Cheh committee in its deliberations presumably did debate that issue and recommended that compelling reasons be used, and also the Faculty Senate several years ago prepared a memorandum in which it put forth its views on the meaning of compelling reasons. So, over time, there has been built up a pretty good understanding of what that phrase has meant and there has not been any significant dispute as to its meaning, as far as he knew. Mr. Weitzner said he did not see any reason to introduce a standard that has not been used in the University, nor did he think reliance on an appellate standard is consistent with the notion of shared governance that we have because it places too much weight on the authority of the faculty committee. He also pointed out that after a decision is made by the Hearing Committee, it can then go to the Dispute Resolution Committee on appeal, and that that Committee appears to have unfettered discretion in modifying or overturning a decision of the Hearing Committee, yet the Dispute Resolution Committee neither hears testimony nor can judge credibility of witnesses. While he was not saying there should be absolutely no standard for administrative review, he thought that "clearly erroneous" sets too high a bar.

Professor Griffith said that in the past most nonconcurrences almost without exception were resolved by the Executive Committee of the Faculty Senate, but there came a point about 7 or 8 years ago when the administration simply stopped accepting the recommendation of the Executive Committee, and they went forward to the President or

Board. He thought that this indicates that the administration has adopted an entirely new flexibility toward the notion of what "compelling reasons" mean, and in the absence of the administration coming forward to establish what they see as compelling reasons, the rationale for moving to a different standard is persuasive. Vice President Lehman said that he had studied carefully Professor Park's memorandum defining the meaning of compelling reasons and that he has no problem living with that if that sets the standard. He said, however, that he did not totally agree with Professor Griffith's conclusion about the outcomes of nonconcurrences because there have been situations where the Executive Committee and the administration were on one path and it was the department which led to the decision being forwarded to the President or the Board. Professor Pelzman pointed out that the Dispute Resolution Committee is not a party to the grievance, but the administration is, and they are asking for the same standard as the Dispute Resolution Committee would use which does not make a great deal of sense. Another problem, he said, is the incentive problem. If the administration wishes to keep the faculty out of civil court and keep disputes within the University, then we have to have a standard high enough to discourage someone from going the other way. Mr. Weitzner responded that he did not think that the compelling reasons standard is a low standard since it has been used in the nonconcurrency context and through that precedent it has been established as a fairly high standard.

Professor Park explained that the clearly erroneous standard looks to mistakes and failures of logic and reasoning by the hearing body; the appellate body, looking at that, must be persuaded that there was a clear error before they will disturb its decisions. In administrative and constitutional law, he said, compelling reasons has a larger function than just looking for the possibility of errors or leaving a decision undisturbed unless there are very significant errors. Compelling reasons go to the question of institutional interest. In the context of the institution's future and its best interests, Professor Park said that we want to make it clear in the Code because this, too, may be reviewed by a court at some point. The language should reflect that the Senate recognized that there are institutional interests for which the President, the Board, and the Vice President for Academic Affairs are responsible and for which lower decision-makers are not. Professor Park said that it seemed to him that compelling reasons language is an improvement in the language.

Professor Wilmarth said that it seemed to him that the key question here is deference. What kind of deference will the administration give to the decision coming up from the faculty decisionmaking process? A concern of a number of faculty with respect to nonconcurrences is that the mindset of the Administration appears to be that it can start de novo and make its own decision about whether a particular candidate, for example, meets tenure or promotion standards. If the Administration made clear that the compelling reasons standard requires it to give substantial deference to the findings of fact and recommendations made by the faculty committee, then he thought he would feel more comfortable because that is the principle the Senate is trying to preserve here. If the faculty committee does not get deference, the grievant is not going to pursue this process, and he questioned whether deference is currently included under the current grievance procedures in the Faculty Code.

Professor Johnston noted that he and Mr. Weitzner have disagreed all along about compelling reasons as to whether it is a high standard or not. Based on that he has heard, Professor Johnston said he did not think compelling reasons has been interpreted by the administration as being as high a standard as he thought. He then asked Mr. Weitzner if he has done any studies showing how many nonconcurrences and how many cases the University has overturned the Executive Committee's recommendation. Mr. Weitzner replied that his office has not done a thorough analysis and, therefore, he does not have enough information at this time to compare. Vice President Lehman noted that he had information for a 5-year period which was provided by Doris Trone, Coordinator, Faculty Senate Activities, which shows that between 1994 and 1999, there were 9 nonconcurrences. The faculty recommendations in 7 of those cases were overturned by the administration - 4 by the President and 3 by the Board. What this information does not tell us, he said, is that in some of these cases, the Executive Committee agreed with the administration, but the department chose not to agree with the Executive Committee and the administration, and sent it forward to the President or the Board. Professor Robinson noted that out of the 9, 7 were reversals of the faculty recommendation. Out of those 7, she said, the Executive Committee agreed with the nonconcurrence in 3 of them. Professor Pelzman pointed out then it was apparent that the administration reversed the faculty recommendation in 50% of them using the compelling reasons standard.

Professor Johnston, addressing Professor Park, said that though he, himself, does not teach administrative law or constitutional law, he was unaware that compelling reasons in that context has anything to do with an arbitration proceeding. He said that the terms he was using are review terms in arbitration and court proceedings. Professor Park replied that he was using the term "compelling reasons" because that is a term we have used in the past, though it is not used in arbitration. Of even the most important rights we have, like speech and freedom of religion, the state can act with compelling reasons to restrict liberties, and, therefore, the notion of compelling reasons goes to the institutional interests of the state. In our situation, we recognize that part of the decision process gives institutional weight to the interests of the University.

Further discussion followed by Professors Johnston, Boswell, Pelzman, and Park.

Professor Wilmarth said that he would support the compelling reasons standard as long as it included deference to the faculty decisionmaking process. Returning to the language of the Resolution, Page 10, he moved that the second sentence of Section 7. Final Disposition be amended, as follows:

"The decision of the relevant Committee shall be deemed final and shall be implemented by the University unless the Vice President for Academic Affairs determines, ~~that the relevant Committee's decision is clearly erroneous and should not be implemented,~~ in which case, after giving substantial deference to the findings and

Correction -  
1/21/00  
"strikes out"  
inadvertently  
omitted.

recommendations of the relevant committee, that there are compelling reasons not to implement the relevant committee's decision. In the event of such a determination, the Vice President shall transmit his or her determination (including an explanation of such compelling reasons) and recommendation, and the record of the case, etc. . . ."

The motion was seconded.

Professor Johnston reminded the Senate that even if Resolution 99/2 were not adopted, the faculty still has a grievance system in place. It was his opinion that the Senate should think twice before it adopts a standard of review that in over 50% of cases has resulted in faculty decisions being overridden. Professor Pelzman agreed with Professor Johnston that, unless we change the system, we should keep the present system; otherwise, this will create incentives for the faculty to go to court. Professor Boswell pointed out that if the compelling reasons standard is adopted, the faculty would be taking a major leap of faith that history is not going to repeat itself. He spoke in support of the amendment with the understanding that we have made a major concession and we would expect due deference to be taken seriously by the administration. Professors Park, McAleavey, and Robinson all spoke in support of the amendment. Professor Griffith moved that debate on the amendment be ended, and the motion was passed. The question was called on the Wilmarth amendment, and the amendment was passed by a vote of 10 to 5.

The question was called on the original motion, as amended, and Resolution 99/2 was adopted, as amended. (Resolution 99/2 is attached.)

## II. RESOLUTION 99/3, "A RESOLUTION TO STRENGTHEN THE RAPE AND SEXUAL ASSAULT POLICY OF THE CODE OF STUDENT CONDUCT"

On behalf of the Joint Committee of Faculty and Students, Professor McAleavey, Co-Chair, moved the adoption of Resolution 99/3, and the motion was seconded. Professor McAleavey explained that this Resolution refers to Chapter 11, Prohibited Conduct, on Page 7 of the Guide to Student Rights and Responsibilities (1999-2000). This Resolution specifically speaks, he said, to Sections 11.a. Rape and 11.b. Sexual Assault which the student members of the Joint Committee thought should be combined into a single new whole title, "Sexual Assault." The major impetus of this coming from the students is that they thought the current policy does not really deal with life as we know it on campus. It does not deal with date rape, for example. Instead it deals with the use of force or threat of force which is not, in fact, the kind of situation most instances of sexual assault or rape on college campuses in general, or on this campus in particular, are defined by. In an effort to improve the usefulness of this document, the Joint Committee has prepared a new statement that includes a fairly explicit description of what consent would require in this contemporary world. He noted that Ms. Linda Shutjer, General Counsel's Office, and Linda Donnels, Associate Vice President and Dean of Students, have both reviewed this



proposed change and signed off on it as being harmless and as probably representing an improvement.

Professor Park said that Professor Wilmarth, who had to leave the meeting early, had asked him to offer language that Professor Wilmarth thought was clarifying, i.e., by making the application of the definition of consent to individual cases more explicit. Professor Park then read the following language proposed by Professor Wilmarth: "depending on the particular circumstances." This language would be inserted in the third sentence of 11.a. to read: "The university community should be aware that, depending on the particular circumstances, previous sexual relationships, or current relationship between the persons involved, or silence, or lack of protest do not necessarily constitute consent." Professor Park said that the Resolution is absolutely correct in that it should not give rise to a presumption that there is consent because there was some previous relationship. But because circumstances are important, he thought that Professor Wilmarth's reminder tells the decision-maker that this should be a concrete decision, not an abstract decision.

Professor McAleavey spoke against the proposed language because he thought that the Resolution requires actual words or conduct indicating consent, and having an ongoing or previous relationship does not create consent automatically. Professor Griffith said that he was troubled by the ambiguity in the words "or conduct." The statement says that some kinds of conduct might indicate consent but then it says these listed aspects of conduct might or might not necessarily mean consent. Vice President Lehman called upon Ms. Linda Shutjer who said that the Counsel's Office reviewed this language, and while she had some questions about procedural issues, those have been resolved. She said that she thought this is an issue in the community and she was supportive of it. She viewed this Resolution as another opportunity to try to educate our community about some of these consent issues, which especially in combination with alcohol become very difficult.

Professor Park moved that the third sentence of 11.a. be amended to read: "The university community should be aware that, depending on the particular circumstances, previous sexual relationships, or current relationship between the persons involved, or silence, or lack of protest do not necessarily constitute consent." The motion was seconded. The question was called on the amendment, and the amendment passed by a vote of 6 to 5.

The question was then called on the original motion, as amended, and Resolution 99/3 was adopted. (Resolution 99/3, as amended, is attached.)

### INTRODUCTION OF RESOLUTIONS

No resolutions were introduced.

**GENERAL BUSINESS:**

**I. REPORT OF THE EXECUTIVE COMMITTEE**

The Report of the Executive Committee by Professor Robinson, Chair, is enclosed.

**II. INTERIM REPORTS OF SENATE COMMITTEE CHAIRS**

Professor Boswell, Chair, Ad Hoc Committee on the proposed College of Professional Studies, said that this is the opportunity for the faculty to participate in the decision-making process on this new effort to make money by establishing a new college. He urged the faculty to provide the Committee with any suggestions and/or questions they might have.

Professor Harrington, Chair, Professional Ethics and Academic Freedom Committee, distributed a written Interim Report of the PEAFF Committee. (The Interim Report is attached.)

**BRIEF STATEMENTS (AND QUESTIONS)**

Professor Park commented that the space for today's Senate meeting was very nice. Professor Robinson said that she thought this space would be the permanent place for Senate meetings, and Vice President Lehman confirmed that it would now be the Senate's permanent place for its meetings.

Professor Griffith noted that the faculty had voiced their protests sometime ago about not being able to charge functions at the new University Club to a departmental card, but instead are required to charge such expenses to the personal account of a faculty member. Vice President Lehman said that that policy has changed and the charge to the department can be made through an IP. Professor Robinson noted that this information about the change was sent to the departments, but the catch is that the IP has to be submitted before the function.

On another matter, Professor Griffith requested that the Executive Committee invite David Swartz, Chief Information Officer, to speak to the Senate about its notification last year that after January 1st the University computing services would no longer support WordPerfect. In listening to his colleagues, Professor Griffith said that many of them, who started with WordPerfect, find it preferable to Microsoft Word. Registrar Selinsky commented that most of his staff use WordPerfect also. He noted that even though he sits on the Administrative Systems Advisory Committee for Computing, when it was announced that WordPerfect would not be supported, it came as a surprise to the Committee, which is supposed to be consulted before a decision like that is made.

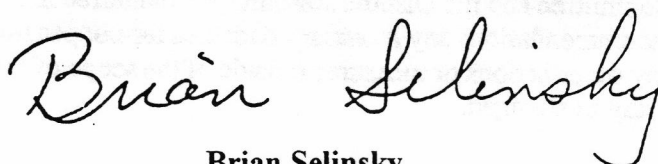
Vice President Lehman noted that the Senate has a lovely Senate Home Page and he urged the faculty to use it to access the minutes and agendas. He then said that he sincerely appreciated being able to participate in discussions and working together with the Senate

Faculty Senate Minutes, December 10, 1999  
Page 11

which he thought indicates some real shared governance effort at the University. He wished everyone a very pleasant holiday break.

**ADJOURNMENT**

Upon motion made and seconded, Vice President Lehman adjourned the meeting at 4:50 p.m.



Brian Selinsky  
Secretary

Proposed Amendments from VPAA to New Grievance Procedures As Proposed By the PEAF Committee in "A Resolution To Amend The 1996 Faculty Code Of The George Washington University

Key: Changes to new language adopted by the PEAF Committee are shown in *italics* for new language and ~~strikeout~~ for deletions.

**Amendment Number 1**

**6. Remedies: *Recommendations.***

A Hearing Committee and the Dispute Resolution Committee may recommend that the University action being challenged be upheld, modified, reconsidered or remanded under specified conditions, or reversed, in whole or in part. A Hearing Committee and the Dispute Resolution Committee may not include as part of their recommendations any *monetary* damages for ~~nonpecuniary~~ losses, punitive damages, or any other actions or measures outside of the scope of the underlying University action being challenged.

**Amendment Number 2**

**7. Final Disposition**

In the absence of a timely appeal filed by either party from a decision of a Hearing Committee, or after a decision of the Dispute Resolution Committee, such decision shall be transmitted to the parties, to the Chair of the Executive Committee of the Faculty Senate, and to the Vice President for Academic Affairs. *Unless the Vice President for Academic Affairs determines that there are compelling reasons to the contrary, the Vice President shall adopt the findings of the relevant Committee, and give strong consideration to the relevant Committee's recommendation of a remedy for resolution of the grievance, as part of his or her decision on behalf of the University. The decision of the relevant committee shall be deemed final and shall be implemented by the University unless the Vice President for Academic Affairs determines that the relevant Committee's decision is clearly erroneous and should not be implemented, in which case there are compelling reasons not to adopt the relevant committee's findings, and/or the Vice President recommends a remedy or resolution materially different than that recommended by the relevant committee, then, unless the Grievant accepts such determination and recommendation, the Vice President shall transmit his or her determination and recommendation, and the record of the case, through the President of the University to the Board of Trustees, or, at the election of the Grievant, solely to the President, with copies to the Grievant and the Chairs of the Dispute Resolution Committee and the Executive Committee of the Faculty Senate, for a prompt final decision of the President or the Board of Trustees.*



THE GEORGE WASHINGTON UNIVERSITY

Faculty Senate

Friday, December 10, 1999

A RESOLUTION TO AMEND THE 1996 FACULTY CODE OF THE GEORGE  
WASHINGTON UNIVERSITY (99/2)

**WHEREAS**, Faculty Senate instituted a Special Faculty Committee to Study the Faculty Grievance Procedures under the Chairmanship of Professor M. Cheh of the GW Law School,

and,

**WHEREAS**, The Executive Committee of the Faculty Senate received the Special Committee's final report on October 15, 1997,

and,

**WHEREAS**, the Professional Ethics and Academic Freedom Committee was requested by the Executive Committee to examine the report and to recommend changes to Article X of the Faculty Code and to Section E of the Procedures for the Implementation of the Faculty Code,

**BE IT THEREFORE RESOLVED** by the Faculty Senate of The George Washington University that:

The Faculty Code of The George Washington University be amended as follows:

*Key: Changes to existing Faculty Code language as proposed by the 10/15/97 Report of the Special Senate Committee to Study the Faculty Grievance Procedures ("Cheh Report"), with modifications thereto adopted by the PEAFC Committee at its meeting on 11/12/99, are shown in underline for new language and ~~strikeout~~ for deletions.*

Professional Ethics and Academic Freedom Committee  
November 12, 1999

Adopted, as amended, December 10, 1999

*Faculty Code*

...

**X. RIGHTS, PRIVILEGES, AND RESOLUTION OF DISPUTES UNDER THIS CODE**

**A. Rights and Privileges Under This Code**

The rights, privileges, and responsibilities of a faculty member, as conferred by this Code, shall be carefully safeguarded in accordance with the highest accepted principles, practices, and procedures of the academic community. An alleged infringement of such rights or privileges or an alleged violation of such responsibilities shall first be considered by the faculty member or members concerned, or by appropriate representatives of the faculty, in cooperation with the responsible administrative officers. If such consideration does not lead to an adjustment satisfactory to the parties involved, the procedures for the implementation of this Article shall be fully utilized.

**B. Grievances**

To maintain a grievance, the complaining party must allege that he or she has suffered a substantial injury resulting from violation of ~~professional~~ rights or privileges concerning academic freedom, research or other scholarly activities, tenure, promotion, reappointment, dismissal, or sabbatical or other leave, arising from:

1. Acts of discrimination prohibited by federal or local law;
2. Failure to comply with ~~follow~~ the Faculty Code, or Faculty Handbook, or other rules, regulations, and procedures established by the University;
3. Arbitrary and capricious actions on behalf of the University ~~actions~~; or arbitrary and capricious applications of federal or local statutes and regulations; or
4. Retaliation for exercise of Code-protected rights.

*Procedures for the Implementation of the Faculty Code*

...

**E. Procedures for Implementation of Article X of the Faculty Code**

**1. Informal Resolution**

Before instituting ~~any formal proceedings concerning an alleged violation of the Faculty Code~~ a formal grievance, the aggrieved party ~~or parties~~ shall make ~~exhaust~~ all reasonable efforts to achieve a resolution of the situation through informal consultation with the appropriate faculty members and administrative officers.

**2. Dispute Resolution Committee**

The Faculty Senate shall elect a Dispute Resolution Committee of fifteen tenured, active-status faculty members, no more than three of whom shall be members of the faculty of any one school (except that four may be members of the faculty of Columbian School and four may be members of the Law School) and none of whom may be serving as academic administrators. The members of the Committee shall serve three-year staggered terms so that the terms of five of the members shall expire each year. The Faculty Senate shall designate the Chair of the Committee from among the members of the Committee. Alternate temporary members may be appointed at any time by the Executive Committee to facilitate the dispute resolution procedures.

**3. Preliminary Proceedings**

If informal consultation fails to resolve the matter or if the aggrieved party concludes that such consultation is not feasible or would be futile, the aggrieved party shall refer the dispute to the Dispute Resolution Committee by means of a letter addressed to the Chair with copies sent to the Chair of the Executive Committee of the Faculty Senate and to the Vice President for Academic Affairs on behalf of the University. ~~of the Executive Committee. The Executive Committee, once it has made its own determination that all reasonable efforts to achieve a resolution through informal consultation have been exhausted, shall appoint either a special mediator or a special mediation committee of three members, none of whom shall be members of the Dispute Resolution Committee;~~

~~and this mediator or mediation committee shall conduct an informal investigation of the matter and attempt to effect expeditiously a mutually satisfactory solution. The appointment shall be recorded in the minutes of the Faculty Senate. The letter shall identify the general nature and circumstances of the dispute. Unless either the University or the aggrieved party objects, the Chair of the Dispute Resolution Committee shall promptly appoint a special mediator of appropriate qualifications to assist the University and the aggrieved party to resolve the dispute.~~

~~c) The special mediator or mediation committee shall report to the Executive Committee, with copies to the parties, only that a mutually satisfactory solution has been achieved, in which case the report should set forth the basis of the settlement or that it has been concluded that further efforts at mediation would be futile. The Special mediator shall report to the chair of the dispute resolution committee that a mutually satisfactory solution has been achieved, in which case the grievance shall be dismissed, or that efforts at mediation were unsuccessful.~~

#### 4. Formal Proceedings

##### a) Commencement of Proceedings

~~1) - If the preliminary proceedings do not result in a mutually satisfactory resolution of the dispute, any party to the dispute may commence formal proceedings by means of a complaint addressed to the Chair of the Dispute Resolution Committee, with copies sent to the Chair of the Executive Committee of the Faculty Senate and the other party or parties.~~

1) If either party declines to mediate or to continue to mediate, or if efforts at mediation are unsuccessful, the aggrieved party may commence formal proceedings by means of a grievance sent to the Chair of the Dispute Resolution Committee, with copies sent to the Chair of the Executive Committee of the Faculty Senate and to the Vice President for Academic Affairs on behalf of the University.



## Resolution (99/2)

2) The grievance shall identify the aggrieved party as the "Grievant" and shall name The George Washington University as the "Respondent". A grievance may not be brought against faculty members of the University, acting in their individual capacities as faculty members. Consistent with Article X.B., a grievance may only be maintained against the University for official acts. The Vice President for Academic Affairs shall identify the appropriate faculty member or administrative official who shall act on behalf of the University as Respondent.

3) The grievance shall set forth with particularity the nature of the dispute, specifying, consistent with Article X.B., the rights or privileges under the Faculty Code alleged to have been violated, the specific act or acts alleged to constitute the violation, and the identity of the remedy sought and the reasons alleged to justify the remedy. The grievance shall also set forth the Grievant's efforts to resolve the dispute informally, or if no such efforts were made, the reasons for failing to make such efforts. No grievance may be maintained on the basis of error that did not affect the substantial rights of the complainant Grievant.

4) Within twenty calendar days of receipt of the grievance the ~~other party or parties to the dispute~~ University shall reply in writing, sending copies of the reply to the Chair of the Dispute Resolution Committee, the Chair of the Executive Committee of the Faculty Senate, and the ~~complaining party or parties~~ Grievant. The reply shall set forth with particularity the position of the ~~replying party or parties~~ University with respect to each allegation of the grievance.

### b) Hearing Committee and Hearing Officer

1) ~~Upon receipt of the complaint and reply~~ Within a reasonably prompt period of time, ordinarily within ten calendar days of receipt of the grievance and reply, the Chair of the Dispute Resolution Committee shall, ~~with the advice of the Executive Committee of the Faculty Senate,~~ appoint a Hearing Committee of three members from among the members of the Dispute Resolution Committee ~~and a presiding Hearing Officer from a panel of names previously approved by the Executive Committee.~~ The Chair of the Dispute Resolution Committee shall designate one member of the Hearing Committee to

serve as the presiding Hearing Officer. The Hearing Officer shall ~~be chosen from among University personnel of~~ have appropriate experience and training but need not be an attorney. ~~The role of the Hearing Officer throughout these procedures is to~~ The Hearing Officer, in addition to serving as a full member of the Hearing Committee, shall assure an orderly, expeditious, and relevant hearing, ~~to~~ assure the development of a complete, fair, and reliable record, and ~~to~~ advise the Hearing Committee as to issues of substance and procedure. ~~The Hearing Committee may request the replacement of the Hearing Officer at any time.~~

2) No member of the same department as ~~a party~~ the Grievant shall sit on the Hearing Committee. Any party to a dispute may disqualify one member of the Hearing Committee by peremptory challenge. Any party may also seek to disqualify any member of the Hearing Committee for cause. The Chair of the Dispute Resolution Committee shall decide any challenges for cause, based on written submissions from the parties. The Chair of the Dispute Resolution Committee shall, from among the remaining members of the Dispute Resolution Committee, fill any vacancies on the Hearing Committee created by challenges.

3) When all challenges have been decided and vacancies filled, and as soon as reasonably possible after receipt of ~~respondent's reply~~ the grievance and reply, the ~~chair of the Dispute Resolution Committee~~ Hearing Officer shall convene the Hearing Committee to review the grievance. If a majority of the Hearing Committee, after an opportunity for argument by the parties, finds that the grievance does not allege facts sufficient to state a grievance under the Code, or that the grievance is based on evidence or allegations substantially the same as those that have previously been heard or decided, or that could have been presented in a previous hearing, the grievance shall be automatically referred to the Dispute Resolution Committee for consideration at the earliest reasonable time. If a majority of the Dispute Resolution Committee, after an opportunity for argument by the parties, agrees ~~concludes~~ that for any of the reasons set out in this section a hearing is not warranted, the grievance shall be dismissed, in whole or in part, and the matters dismissed shall be deemed closed.

4) On the determination that a hearing is warranted, the ~~Hearing Committee shall be convened by the presiding Hearing Officer and~~ Hearing Officer shall promptly convene the Hearing Committee, which shall establish a schedule for the hearing. Grievances shall be heard and decided with reasonable dispatch, and, ordinarily, shall be completed by the Hearing Committee within three months after the determination that a hearing is warranted.

5) All three members of the Hearing Committee shall be present during the hearings and deliberations of the Committee, except that the presence of one of them during part of the proceedings may be waived by agreement of the parties.

6) It shall be the duty of the Hearing Officer to convene promptly the meetings of the Hearing Committee and to preside; to assure the expeditious disposition of the case; to rule on all questions of ~~substance or~~ procedure necessary to the conduct of the hearing, subject to being overridden by ~~a majority vote of~~ the other two members of the Hearing Committee; ~~to ask questions and~~ to control the development of testimony and of evidence in the record ~~as deemed appropriate~~; to prepare or assign the writing of an draft opinion ~~for the use~~ on behalf of the Hearing Committee; and to advise the Hearing Committee in its deliberations on questions of substance and procedure. The Hearing Officer ~~does not vote on the~~ is a full member of the Hearing Committee, and the Hearing Committee shall decide all ultimate questions of fact, substance, procedure, or policy, ~~as these are acted upon by the Hearing Committee~~ by majority vote. The Hearing Officer shall sign dispositive orders ~~of the~~ on behalf of the Hearing Committee ~~only to authenticate them.~~

7) Members of the Hearing Committee, members of the Dispute Resolution Committee, and the parties shall avoid ex parte communications bearing on the substance of the dispute.

c) Procedure for Hearings

1) The parties to the proceedings shall be entitled to appear in person and to be represented by counsel or other adviser.

2) A grievance procedure is not a formal judicial proceeding. Its purpose is to provide a fair evaluation of an allegation that a right or privilege has been violated. In order to achieve that end, the Hearing Committee shall have authority to call any material witness who is a member of the University faculty, administration, or staff and any other person who is willing to testify; to question parties and witnesses; to exclude matters it deems irrelevant; to place reasonable limits on arguments, the presentation of evidence, and the questioning of witnesses by the parties. The University ~~will make a reasonable effort to facilitate the appearance of witnesses~~ shall use its best efforts to assure the appearance of all faculty, administration, and staff reasonably called to testify.

3) The procedure at the hearings shall be informal but shall comply with the requirements of fairness to the parties. The Hearing Committee is not required to comply with rules of evidence applicable in courts of law and may receive any relevant evidence that is not privileged. The Hearing Committee may decline to consider evidence when its probative value is outweighed by considerations of unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence. The parties shall be entitled to testify on their own behalf; to call as material witnesses any member of the University faculty, administration, or staff and any other person who is willing to testify; to present written and other evidence; and to cross-examine witnesses called by other parties. A party shall be entitled to inspect and copy, in advance of the hearing, all ~~any~~ relevant documents in the control of the other party and not privileged and may offer such documents or excerpts therefrom in evidence. ~~The University will make a reasonable effort to facilitate the appearance of witnesses.~~

4) The parties shall be entitled to present opening and closing statements.

5) A stenographic record of the hearings shall be made and one copy, which shall be available to all parties, kept on file by the University.

6) The hearings shall be open to the public unless, on the motion of a party or the Hearing Committee, the Hearing Committee shall determine that it is in the best interest of the University and the parties that the hearings be closed.

7) At the conclusion of the presentation of evidence and argument from both sides, the Committee shall convene in closed session to deliberate and reach a decision in closed session. In rendering its decision, the Hearing Committee shall not substitute its judgment for that of the maker of the decision being challenged. Rather it shall determine whether the Grievant has established by clear and convincing evidence that he or she has suffered a substantial injury pursuant to Article X.B. ~~resulting from: 1) acts of discrimination prohibited by federal or local law; 2) the decision maker's failure to follow the Faculty Code, or Faculty Handbook, or other rules, regulations, and procedures established by the University; 3) arbitrary and capricious applications of federal or local statutes and regulations; or 4) retaliation for exercise of Code protected rights.~~



8) The Hearing Committee shall render its findings and recommendations in a written opinion ~~report~~ that shall state the number of members subscribing to the opinion ~~report~~ and shall include dissenting opinions, if any. This opinion ~~report~~ shall be submitted to the Chair of the Dispute Resolution Committee ~~Executive Committee of the Faculty Senate~~, and copies shall be transmitted to the parties and to the Chair of the Executive Committee of the Faculty Senate ~~Dispute Resolution Committee~~.

9) The hearing procedures shall be concluded and the Hearing Committee's findings and recommendations shall be rendered as soon as practicable.

## 5. Appeals

a) Any party may appeal the final decision of the Hearing Committee by filing a notice of appeal with the Chair of the Dispute Resolution Committee and sending copies thereof to the Chair of the Executive Committee of the Faculty Senate and to the other parties. The notice of appeal must be filed within ten calendar days of the receipt of the decision of the Hearing Committee.

b) An appeal shall be heard by members of the Dispute Resolution Committee who were not members of the Hearing Committee, provided that members of the Dispute Resolution Committee who were disqualified from sitting as members of the Hearing Committee and members of the same department as the Grievant ~~any of the parties~~ shall not participate in the hearings of the appeal. A quorum for hearing an appeal shall be two-thirds of those members of the Dispute Resolution Committee eligible under the terms of this section.

c) The parties to an appeal shall be entitled to present written and oral argument. However, evidence not introduced in the hearing may not be considered on appeal.

d) The Dispute Resolution Committee shall decide by majority vote and render an opinion in writing, sustaining, modifying, overruling, or remanding the decision of the Hearing Committee. ~~Copies of the opinion shall be transmitted to the parties and the Chair of the Executive Committee of the Faculty Senate.~~

## 6. Remedies.

A Hearing Committee and the Dispute Resolution Committee may recommend that the University action being challenged be upheld, modified, reconsidered or remanded under specified conditions, or reversed, in whole or in part. A Hearing Committee and the Dispute Resolution Committee may not include as part of their recommendations any damages for nonpecuniary losses, punitive damages, or any other actions or measures outside of the scope of the underlying University action being challenged.

### 5.7. Final Disposition

[When the time for filing an appeal has expired without an appeal having been commenced, or when the appeal process has been completed and a final decision has been rendered, the record of the case, including the decisions of the Hearing Committee and the Dispute Resolution Committee, shall be transmitted to the President and the Board of Trustees for final disposition. In the absence of a timely appeal filed by either party from a decision of a Hearing Committee, or after a decision of the Dispute Resolution Committee, such decision shall be transmitted to the parties, to the Chair of the Executive Committee of the Faculty Senate, and to the Vice President for Academic Affairs. The decision of the relevant Committee shall be deemed final and shall be implemented by the University unless the Vice President for Academic Affairs determines, that the relevant Committee's decision is clearly erroneous and should not be implemented, in which case, AFTER GIVING SUBSTANTIAL DEFERENCE TO THE FINDINGS AND RECOMMENDATIONS OF THE RELEVANT COMMITTEE, THAT THERE ARE COMPELLING REASONS NOT TO IMPLEMENT THE RELEVANT COMMITTEE'S DECISION. IN THE EVENT OF SUCH A DETERMINATION, the Vice President shall transmit his or her determination (INCLUDING AN EXPLANATION OF SUCH COMPELLING REASONS) and recommendation, and the record of the case through the President of the University to the Board of Trustees, or, at the election of the Grievant, solely to the President, with copies to the Grievant.] *(language inadvertently dropped.)*

### 5.7. Final Disposition

In the absence of a timely appeal filed by either party from a decision of a Hearing Committee, or after a decision of the Dispute Resolution Committee, such decision shall be transmitted to the parties, to the chair of the Executive Committee of the Faculty Senate, and to the Vice President for Academic Affairs.

**A RESOLUTION TO STRENGTHEN THE RAPE AND SEXUAL ASSAULT POLICY  
OF THE CODE OF STUDENT CONDUCT (99/3)**

WHEREAS, the current Code of Student Conduct, last reviewed three years ago, reflects the common belief that, as a general rule, both rape and sexual assault involve physical force between strangers; and

WHEREAS, at GW, as at most universities, rape and sexual assault are far more likely to involve acquaintances, do not necessarily include physical force, and often involve drugs or alcohol; and

WHEREAS, the current Code includes a definition of the lack of consent which may not account for the possibilities and complexities of incidents of sexual invasion, and should be updated to provide more guidance for the university community as to the definition of consent itself; and

WHEREAS, separating rape and sexual assault, as the current Code does (even though the recommended minimum sanctions are the same), creates a distinction which could lead members of the community to ignore the seriousness of all forms of sexual invasion; NOW, THEREFORE

**BE IT RESOLVED BY THE FACULTY SENATE OF THE GEORGE WASHINGTON UNIVERSITY**

(1) That parts *a* and *b* of Section 11, the Code of Student Conduct, be replaced by the following language:

11.     *a.*     *Sexual Assault* – inflicting any sexual invasion (including but not limited to sexual intercourse) upon any person without that person's consent. "Consent" requires actual words or conduct indicating a freely-given agreement to have sexual intercourse, or to participate in sexual activities. The university community should be aware that, depending on the particular circumstances, previous sexual relationships, or current relationship between the persons involved, or silence, or lack of protest do not necessarily constitute consent. Further, the degree of impairment of a person's ability to give or withhold consent (including but not limited to incapacity or helplessness caused by alcohol or other drugs) may be introduced as pertinent information at any university disciplinary hearing.

(2) That the rest of the Code of Student Conduct be revised as needed to reflect this change.

Joint Committee of Faculty and Students  
November 16, 1999

Adopted, as amended, December 10, 1999

# **THE GEORGE WASHINGTON UNIVERSITY**

## **The Faculty Senate**

### **Professional Ethics and Academic Freedom (PEAF) Committee**

#### **Interim Report to the Faculty Senate December 10, 1999**

##### **1. Summary**

The Professional Ethics and Academic Freedom Committee has met on 4 occasions during the 1999 Fall semester. Of the 5 items referred to the committee by the Senate Executive Committee at the beginning of the Senate Year in May, only the matter of Faculty Grievance Procedures has been addressed in detail. A resolution, forwarded to the Executive Committee, has been included in today's agenda for debate. No further items were referred to the committee during the semester and no matters relating to the charge of the committee were brought forward.

##### **2. Sexual Harassment Complaints Procedures**

Professor D. Robinson of the GW Law School has accepted the chairmanship of a subcommittee to look into the new Procedures for dealing with these complaints. At the time of writing, the Joint Faculty and Administration Committee which has been charged with producing a proposal for these procedures has yet to report. The PEAf committee is awaiting this report. It is anticipated the report will contain several issues affecting the rights and responsibilities of faculty.

##### **3. Faculty Grievances Procedures**

Professor G. Johnston of the GW Law School accepted the chairmanship of a subcommittee to draft a new set of procedures and hence amendments to the Faculty Code. Members of the PEAf committee, Professor J. Garcia of GSEHD, Ms. E. Weston of the Library and Mr. R. Weitzner of the Office of General Counsel served on the subcommittee. Beginning with the Report chaired by Professor M. Cheh of the GW Law School, the 'Cheh Report', the subcommittee drafted a report for the PEAf committee each substantive item of which was voted on at two of its meetings. The members of the subcommittee and the members of the original committee which drafted the 'Cheh Report' are to be congratulated on completing a difficult and important task. Special thanks are due from the Faculty to Professors Cheh and Johnston onto whom most of the detailed work devolved.

#### 4. Review of the Medical Center policies and procedures/'Full Professional Effort'

Professor K. Darr accepted the chairmanship of a subcommittee to look into issues affecting faculty in the GW Medical Center with regard to faculty rights and responsibilities and to proposed Faculty Code amendments where required. Due to a number of changes in the Medical Center, presently on-going or proposed, the subcommittee has informed the PEAFF committee that it considers a report to be premature. It is hoped that the subcommittee will be able to make recommendations in the Spring semester.

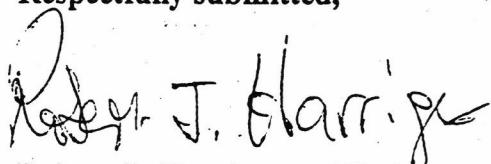
#### 5. Grievances against members of the Senate Committees

This item was considered moot by the PEAFF committee as the new Grievance Procedures would cover such grievances.

#### 6. New Business

While an Ad Hoc committee has been elected by the Faculty Senate to look into the new School of Professional Studies proposed by the Administration, it is anticipated that issues regarding faculty rights and responsibilities will be raised and therefore a subcommittee of PEAFF is likely.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Robert J. Harrington", with a stylized flourish at the end.

Robert J. Harrington (Chairman, PEAFF Committee)  
December 10, 1999



## REPORT OF THE EXECUTIVE COMMITTEE

December 10, 1999

Professor Lilien F. Robinson, Chair

### 1. APPOINTMENT OF AD HOC COMMITTEE ON THE PROPOSED COLLEGE OF PROFESSIONAL STUDIES

An Ad Hoc Committee on the proposed College of Professional Studies was appointed by the Executive Committee November 19<sup>th</sup>. The members are: Professors John G. Boswell, Chair, (GSEHD), Marie M. Cassidy (SMHS), John Carson (SBPM), Kurt J. Darr (SPHHS), Paul B. Duff (CSAS), Robert J. Harrington (SEAS), Gerald P. Johnston (GWLS), and Joseph Pelzman (ESIA); Debra R. Sheldon (SBPM); Associate Vice President Roger Whitaker, ex officio. Any comments, questions, or recommendations should be forwarded to the Ad Hoc Committee.

### 2. ELECTION OF FACULTY SENATE MEMBERS FOR THE 2000-01 SESSION

A memorandum from the Executive Committee was sent to the Deans recently regarding election of members of the Faculty Senate from their respective Schools. The Faculty Organization Plan requires that these elections take place prior to March 15, and the Executive Committee has requested that the results be transmitted prior to that date so that the organization of the Senate for the 2000-01 Session can be accomplished. The Executive Committee would appreciate your assistance in having this item placed on the agenda for the next meeting of your school.

### 3. ANNOUNCEMENTS

The next meeting of the Executive Committee is December 17<sup>th</sup> to plan the agenda for the January 21<sup>st</sup> Senate meeting. Any items of business that you would like to have the Executive Committee consider, please let us know at your earliest convenience.

On behalf of the Executive Committee, I extend best wishes to everyone for the Holiday Season and the New Year.

THE GEORGE WASHINGTON UNIVERSITY  
Washington, DC

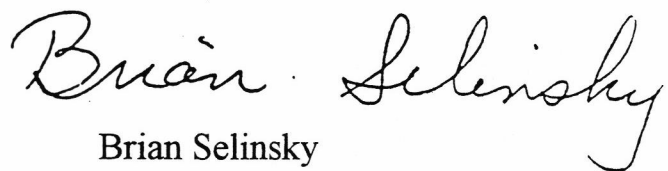
The Faculty Senate

November 29, 1999

The Faculty Senate will meet on Friday, December 10, 1999, at 2:10 p.m. in the new Alumni House (former F Street Club), First Floor, 1925 F Street, NW.

AGENDA

1. Call to order
2. Approval of the minutes of the regular meeting of November 12, 1999, as distributed.
3. Resolutions:
  - (a) A RESOLUTION TO AMEND THE 1996 FACULTY CODE OF THE GEORGE WASHINGTON UNIVERSITY (99/2); Professor Gerald P. Johnston, Chair, Subcommittee of the Professional Ethics and Academic Freedom Committee (Resolution 99/2 with accompanying amendments attached)
  - (b) A RESOLUTION TO STRENGTHEN THE RAPE AND SEXUAL ASSAULT POLICY OF THE CODE OF STUDENT CONDUCT (99/3); Professor David W. McAleavey, Faculty Co-Chair, Joint Committee of Faculty and Students (Resolution 99/3 attached)
4. Introduction of Resolutions
5. General Business:
  - (a) Report of the Executive Committee: Professor Lilien F. Robinson, Chair
  - (b) Interim Reports of Senate Committee Chairs
6. Brief Statements (and Questions)
7. Adjournment



Brian Selinsky  
Secretary

**THE GEORGE WASHINGTON UNIVERSITY**

**Faculty Senate**

**Friday, December 10, 1999**

**A RESOLUTION TO AMEND THE 1996 FACULTY CODE OF THE GEORGE  
WASHINGTON UNIVERSITY (99/2)**

**WHEREAS**, Faculty Senate instituted a Special Faculty Committee to Study the Faculty Grievance Procedures under the Chairmanship of Professor M. Cheh of the GW Law School,

and,

**WHEREAS**, The Executive Committee of the Faculty Senate received the Special Committee's final report on October 15, 1997,

and,

**WHEREAS**, the Professional Ethics and Academic Freedom Committee was requested by the Executive Committee to examine the report and to recommend changes to Article X of the Faculty Code and to Section E of the Procedures for the Implementation of the Faculty Code,

**BE IT THEREFORE RESOLVED** by the Faculty Senate of The George Washington University that:

The Faculty Code of The George Washington University be amended as follows:

*Key: Changes to existing Faculty Code language as proposed by the 10/15/97 Report of the Special Senate Committee to Study the Faculty Grievance Procedures ("Cheh Report"), with modifications thereto adopted by the PEAFF Committee at its meeting on 11/12/99, are shown in underline for new language and ~~strikeout~~ for deletions.*

Professional Ethics and Academic Freedom Committee  
November 12, 1999

*Faculty Code*

...

**X. RIGHTS, PRIVILEGES, AND RESOLUTION OF DISPUTES UNDER THIS CODE**

**A. Rights and Privileges Under This Code**

The rights, privileges, and responsibilities of a faculty member, as conferred by this Code, shall be carefully safeguarded in accordance with the highest accepted principles, practices, and procedures of the academic community. An alleged infringement of such rights or privileges or an alleged violation of such responsibilities shall first be considered by the faculty member or members concerned, or by appropriate representatives of the faculty, in cooperation with the responsible administrative officers. If such consideration does not lead to an adjustment satisfactory to the parties involved, the procedures for the implementation of this Article shall be fully utilized.

**B. Grievances**

To maintain a grievance, the complaining party must allege that he or she has suffered a substantial injury resulting from violation of ~~professional~~ rights or privileges concerning academic freedom, research or other scholarly activities, tenure, promotion, reappointment, dismissal, or sabbatical or other leave, arising from:

1. Acts of discrimination prohibited by federal or local law;
2. Failure to comply with ~~follow~~ the Faculty Code, or Faculty Handbook, or other rules, regulations, and procedures established by the University;
3. Arbitrary and capricious actions on behalf of the University ~~actions~~; or arbitrary and capricious applications of federal or local statutes and regulations; or
4. Retaliation for exercise of Code-protected rights.

*Procedures for the Implementation of the Faculty Code*

...

**E. Procedures for Implementation of Article X of the Faculty Code**

**1. Informal Resolution**

Before instituting ~~any formal proceedings concerning an alleged violation of the Faculty Code~~ a formal grievance, the aggrieved party ~~or parties~~ shall make exhaust all reasonable efforts to achieve a resolution of the situation through informal consultation with the appropriate faculty members and administrative officers.

**2. Dispute Resolution Committee**

The Faculty Senate shall elect a Dispute Resolution Committee of fifteen tenured, active-status faculty members, no more than three of whom shall be members of the faculty of any one school (except that four may be members of the faculty of Columbian School and four may be members of the Law School) and none of whom may be serving as academic administrators. The members of the Committee shall serve three-year staggered terms so that the terms of five of the members shall expire each year. The Faculty Senate shall designate the Chair of the Committee from among the members of the Committee. Alternate temporary members may be appointed at any time by the Executive Committee to facilitate the dispute resolution procedures.

**3. Preliminary Proceedings**

If informal consultation fails to resolve the matter or if the aggrieved party concludes that such consultation is not feasible or would be futile, the aggrieved party shall refer the dispute to the Dispute Resolution Committee by means of a letter addressed to the Chair with copies sent to the Chair of the Executive Committee of the Faculty Senate and to the Vice President for Academic Affairs on behalf of the University. ~~of the Executive Committee. The Executive Committee, once it has made its own determination that all reasonable efforts to achieve a resolution through informal consultation have been exhausted, shall appoint either a special mediator or a special mediation committee of three members, none of whom shall be members of the Dispute Resolution Committee;~~



~~and this mediator or mediation committee shall conduct an informal investigation of the matter and attempt to effect expeditiously a mutually satisfactory solution. The appointment shall be recorded in the minutes of the Faculty Senate. The letter shall identify the general nature and circumstances of the dispute. Unless either the University or the aggrieved party objects, the Chair of the Dispute Resolution Committee shall promptly appoint a special mediator of appropriate qualifications to assist the University and the aggrieved party to resolve the dispute.~~

~~c) The special mediator or mediation committee shall report to the Executive Committee, with copies to the parties, only that a mutually satisfactory solution has been achieved, in which case the report should set forth the basis of the settlement or that it has been concluded that further efforts at mediation would be futile. The Special mediator shall report to the chair of the dispute resolution committee that a mutually satisfactory solution has been achieved, in which case the grievance shall be dismissed, or that efforts at mediation were unsuccessful.~~

#### **4. Formal Proceedings**

##### **a) Commencement of Proceedings**

1) If either party declines to mediate or to continue to mediate, or if efforts at mediation are unsuccessful, the aggrieved party may commence formal proceedings by means of a grievance sent to the Chair of the Dispute Resolution Committee, with copies sent to the Chair of the Executive Committee of the Faculty Senate and to the Vice President for Academic Affairs on behalf of the University.

2) The grievance shall identify the aggrieved party as the "Grievant" and shall name The George Washington University as the "Respondent". A grievance may not be brought against faculty members of the University, acting in their individual capacities as faculty members. Consistent with Article X.B., a grievance may only be maintained against the University for official acts. The Vice President for Academic Affairs shall identify the appropriate faculty member or administrative official who shall act on behalf of the University as Respondent.

3) The grievance shall set forth with particularity the nature of the dispute, specifying, consistent with Article X.B., the rights or privileges under the Faculty Code alleged to have been violated, the specific act or acts alleged to constitute the violation, and the identity of the remedy sought and the reasons alleged to justify the remedy. The grievance shall also set forth the Grievant's efforts to resolve the dispute informally, or if no such efforts were made, the reasons for failing to make such efforts. No grievance may be maintained on the basis of error that did not affect the substantial rights of the complainant Grievant.

4) Within twenty calendar days of receipt of the grievance the ~~other party or parties to the dispute~~ University shall reply in writing, sending copies of the reply to the Chair of the Dispute Resolution Committee, the Chair of the Executive Committee of the Faculty Senate, and the ~~complaining party or parties~~ Grievant. The reply shall set forth with particularity the position of the ~~replying party or parties~~ University with respect to each allegation of the grievance.

b) Hearing Committee and Hearing Officer

1) ~~Upon receipt of the complaint and reply~~ Within a reasonably prompt period of time, ordinarily within ten calendar days of receipt of the grievance and reply, the Chair of the Dispute Resolution Committee shall, ~~with the advice of the Executive Committee of the Faculty Senate,~~ appoint a Hearing Committee of three members from among the members of the Dispute Resolution Committee ~~and a presiding Hearing Officer from a panel of names previously approved by the Executive Committee.~~ The Chair of the Dispute Resolution Committee shall designate one member of the Hearing Committee to serve as the presiding Hearing Officer. The Hearing Officer shall ~~be chosen from among University personnel of~~ have appropriate experience and training but need not be an attorney. ~~The role of the Hearing Officer throughout these procedures is to~~ The Hearing Officer, in addition to serving as a full member of the Hearing Committee, shall assure an orderly, expeditious, and relevant hearing, to assure the development of a complete, fair, and reliable record, and to advise the Hearing Committee as to issues of substance and procedure. The Hearing Committee may request the replacement of the Hearing Officer at any time.

2) No member of the same department as ~~a party~~ the Grievant shall sit on the Hearing Committee. Any party to a dispute may disqualify one member of the Hearing Committee by peremptory challenge. Any party may also seek to disqualify any member of the Hearing Committee for cause. The Chair of the Dispute Resolution Committee shall decide any challenges for cause, based on written submissions from the parties. The Chair of the Dispute Resolution Committee shall, from among the remaining members of the Dispute Resolution Committee, fill any vacancies on the Hearing Committee created by challenges.

3) When all challenges have been decided and vacancies filled, and as soon as reasonably possible after receipt of ~~respondent's reply~~ the grievance and reply, the ~~chair of the Dispute Resolution Committee~~ Hearing Officer shall convene the Hearing Committee to review the grievance. If a majority of the Hearing Committee, after an opportunity for argument by the parties, finds that the grievance does not allege facts sufficient to state a grievance under the Code, or that the grievance is based on evidence or allegations substantially the same as those that have previously been heard or decided, or that could have been presented in a previous hearing, the grievance shall be automatically referred to the Dispute Resolution Committee for consideration at the earliest reasonable time. If a majority of the Dispute Resolution Committee, after an opportunity for argument by the parties, agrees ~~concludes~~ that for any of the reasons set out in this section a hearing is not warranted, the grievance shall be dismissed, in whole or in part, and the matters dismissed shall be deemed closed.

4) On the determination that a hearing is warranted, the ~~Hearing Committee shall be convened by the presiding Hearing Officer and~~ Hearing Officer shall promptly convene the Hearing Committee, which shall establish a schedule for the hearing. Grievances shall be heard and decided with reasonable dispatch, and, ordinarily, shall be completed by the Hearing Committee within three months after the determination that a hearing is warranted.

5) All three members of the Hearing Committee shall be present during the hearings and deliberations of the Committee, except that the presence of one of them during part of the proceedings may be waived by agreement of the parties.

6) It shall be the duty of the Hearing Officer to convene promptly the meetings of the Hearing Committee and to preside; to assure the expeditious disposition of the case; to rule on all questions of ~~substance or~~ procedure necessary to the conduct of the hearing, subject to being overridden by ~~a majority vote of the other two members of the Hearing Committee; to ask questions and~~ to control the development of testimony and of evidence in the record ~~as deemed appropriate~~; to prepare or assign the writing of an draft opinion ~~for the use on behalf of the Hearing Committee~~; and to advise the Hearing Committee in its deliberations on questions of substance and procedure. The Hearing Officer ~~does not vote on the~~ is a full member of the Hearing Committee, and the Hearing Committee shall decide all ultimate questions of fact, substance, procedure, or policy, ~~as these are acted upon by the Hearing Committee~~ by majority vote. The Hearing Officer shall sign dispositive orders ~~of the on behalf of the Hearing Committee only to authenticate them.~~

7) Members of the Hearing Committee, members of the Dispute Resolution Committee, and the parties shall avoid ex parte communications bearing on the substance of the dispute.

c) Procedure for Hearings

1) The parties to the proceedings shall be entitled to appear in person and to be represented by counsel or other adviser.

2) A grievance procedure is not a formal judicial proceeding. Its purpose is to provide a fair evaluation of an allegation that a right or privilege has been violated. In order to achieve that end, the Hearing Committee shall have authority to call any material witness who is a member of the University faculty, administration, or staff and any other person who is willing to testify; to question parties and witnesses; to exclude matters it deems irrelevant; to place reasonable limits on arguments, the presentation of evidence, and the questioning of witnesses by the parties. The University ~~will make a reasonable effort to facilitate the appearance of witnesses~~ shall use its best efforts to assure the appearance of all faculty, administration, and staff reasonably called to testify.

3) The procedure at the hearings shall be informal but shall comply with the requirements of fairness to the parties. The Hearing Committee is not required to comply with rules of evidence applicable in courts of law and may receive any relevant evidence that is not privileged. The Hearing Committee may decline to consider evidence when its probative value is outweighed by considerations of unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence. The parties shall be entitled to testify on their own behalf; to call as material witnesses any member of the University faculty, administration, or staff and any other person who is willing to testify; to present written and other evidence; and to cross-examine witnesses called by other parties. A party shall be entitled to inspect and copy, in advance of the hearing, all ~~any~~ relevant documents in the control of the other party and not privileged and may offer such documents or excerpts therefrom in evidence. ~~The University will make a reasonable effort to facilitate the appearance of witnesses.~~

4) The parties shall be entitled to present opening and closing statements.

5) A stenographic record of the hearings shall be made and one copy, which shall be available to all parties, kept on file by the University.

6) The hearings shall be open to the public unless, on the motion of a party or the Hearing Committee, the Hearing Committee shall determine that it is in the best interest of the University and the parties that the hearings be closed.

7) At the conclusion of the presentation of evidence and argument from both sides, the Committee shall convene in closed session to deliberate and reach a decision in ~~closed session~~. In rendering its decision, the Hearing Committee shall not substitute its judgment for that of the maker of the decision being challenged. Rather it shall determine whether the Grievant has established by clear and convincing evidence that he or she has suffered a substantial injury pursuant to Article X.B. ~~resulting from: 1) acts of discrimination prohibited by federal or local law; 2) the decision maker's failure to follow the Faculty Code, or Faculty Handbook, or other rules, regulations, and procedures established by the University; 3) arbitrary and capricious applications of federal or local statutes and regulations; or 4) retaliation for exercise of Code protected rights.~~



8) The Hearing Committee shall render its findings and recommendations in a written opinion ~~report~~ that shall state the number of members subscribing to the opinion ~~report~~ and shall include dissenting opinions, if any. This opinion ~~report~~ shall be submitted to the Chair of the Dispute Resolution Committee ~~Executive Committee of the Faculty Senate~~, and copies shall be transmitted to the parties and to the Chair of the Executive Committee of the Faculty Senate ~~Dispute Resolution Committee~~.

9) The hearing procedures shall be concluded and the Hearing Committee's findings and recommendations shall be rendered as soon as practicable.

## 5. Appeals

a) Any party may appeal the final decision of the Hearing Committee by filing a notice of appeal with the Chair of the Dispute Resolution Committee and sending copies thereof to the Chair of the Executive Committee of the Faculty Senate and to the other parties. The notice of appeal must be filed within ten calendar days of the receipt of the decision of the Hearing Committee.

b) An appeal shall be heard by members of the Dispute Resolution Committee who were not members of the Hearing Committee, provided that members of the Dispute Resolution Committee who were disqualified from sitting as members of the Hearing Committee and members of the same department as the Grievant ~~any of the parties~~ shall not participate in the hearings of the appeal. A quorum for hearing an appeal shall be two-thirds of those members of the Dispute Resolution Committee eligible under the terms of this section.

c) The parties to an appeal shall be entitled to present written and oral argument. However, evidence not introduced in the hearing may not be considered on appeal.

d) The Dispute Resolution Committee shall decide by majority vote and render an opinion in writing, sustaining, modifying, overruling, or remanding the decision of the Hearing Committee. ~~Copies of the opinion shall be transmitted to the parties and the Chair of the Executive Committee of the Faculty Senate.~~

## **6. Remedies.**

A Hearing Committee and the Dispute Resolution Committee may recommend that the University action being challenged be upheld, modified, reconsidered or remanded under specified conditions, or reversed, in whole or in part. A Hearing Committee and the Dispute Resolution Committee may not include as part of their recommendations any damages for nonpecuniary losses, punitive damages, or any other actions or measures outside of the scope of the underlying University action being challenged.

## **5.7. Final Disposition**

~~[When the time for filing an appeal has expired without an appeal having been commenced, or when the appeal process has been completed and a final decision has been rendered, the record of the case, including the decisions of the Hearing Committee and the Dispute Resolution Committee, shall be transmitted to the President and the Board of Trustees for final disposition. In the absence of a timely appeal filed by either party from a decision of a Hearing Committee, or after a decision of the Dispute Resolution Committee, such decision shall be transmitted to the parties, to the Chair of the Executive Committee of the Faculty Senate, and to the Vice President for Academic Affairs. The decision of the relevant Committee shall be deemed final and shall be implemented by the University unless the Vice President for Academic Affairs determines that the relevant Committee's decision is clearly erroneous and should not be implemented, in which case the Vice President shall transmit his or her determination and recommendation, and the record of the case, through the President of the University to the Board of Trustees, or, at the election of the Grievant, solely to the President, with copies to the Grievant and the Chairs of the Dispute Resolution Committee and the Executive Committee of the Faculty Senate, for a prompt decision of the President or the Board of Trustees.~~

## **5.7. Final Disposition**

~~In the absence of a timely appeal filed by either party from a decision of a Hearing Committee, or after a decision of the Dispute Resolution Committee, such decision shall be transmitted to the parties, to the chair of the Executive Committee of the Faculty Senate, and to the Vice President for Academic Affairs.~~

A RESOLUTION TO STRENGTHEN THE RAPE AND SEXUAL ASSAULT POLICY  
OF THE CODE OF STUDENT CONDUCT (99/3)

WHEREAS, the current Code of Student Conduct, last reviewed three years ago, reflects the common belief that, as a general rule, both rape and sexual assault involve physical force between strangers; and

WHEREAS, at GW, as at most universities, rape and sexual assault are far more likely to involve acquaintances, do not necessarily include physical force, and often involve drugs or alcohol; and

WHEREAS, the current Code includes a definition of the lack of consent which may not account for the possibilities and complexities of incidents of sexual invasion, and should be updated to provide more guidance for the university community as to the definition of consent itself; and

WHEREAS, separating rape and sexual assault, as the current Code does (even though the recommended minimum sanctions are the same), creates a distinction which could lead members of the community to ignore the seriousness of all forms of sexual invasion; NOW, THEREFORE

BE IT RESOLVED BY THE FACULTY SENATE OF THE GEORGE WASHINGTON UNIVERSITY

(1) That parts *a* and *b* of Section 11, the Code of Student Conduct, be replaced by the following language:

11.    *a.*    *Sexual Assault* – inflicting any sexual invasion (including but not limited to sexual intercourse) upon any person without that person's consent. "Consent" requires actual words or conduct indicating a freely-given agreement to have sexual intercourse, or to participate in sexual activities. The university community should be aware that previous sexual relationships, or current relationship between the persons involved, or silence, or lack of protest do not necessarily constitute consent. Further, the degree of impairment of a person's ability to give or withhold consent (including but not limited to incapacity or helplessness caused by alcohol or other drugs) may be introduced as pertinent information at any university disciplinary hearing.

(2) That the rest of the Code of Student Conduct be revised as needed to reflect this change.

Joint Committee of Faculty and Students  
November 16, 1999

## 6. Remedies.

A Hearing Committee and the Dispute Resolution Committee may recommend that the University action being challenged be upheld, modified, reconsidered or remanded under specified conditions, or reversed, in whole or in part. A Hearing Committee and the Dispute Resolution Committee may not include as part of their recommendations any damages for nonpecuniary losses, punitive damages, or any other actions or measures outside of the scope of the underlying University action being challenged.

## 5.7. Final Disposition

~~When the time for filing an appeal has expired without an appeal having been commenced, or when the appeal process has been completed and a final decision has been rendered, the record of the case, including the decisions of the Hearing Committee and the Dispute Resolution Committee, shall be transmitted to the President and the Board of Trustees for final disposition. In the absence of a timely appeal filed by either party from a decision of a Hearing Committee, or after a decision of the Dispute Resolution Committee, such decision shall be transmitted to the parties, to the Chair of the Executive Committee of the Faculty Senate, and to the Vice President for Academic Affairs. The decision of the relevant Committee shall be deemed final and shall be implemented by the University unless the Vice President for Academic Affairs determines, that the relevant Committee's decision is clearly erroneous and should not be implemented, in which case, after giving substantial deference to the findings and recommendations of the relevant Committee, that there are compelling reasons not to implement the relevant Committee's decision. In the event of such a determination, the Vice President shall transmit his or her determination (including an explanation of such compelling reasons) and the record of the case through the President of the University to the Board of Trustees, or, at the election of the Grievant, solely to the President, with copies to the Grievant and the Chairs of the Dispute Resolution Committee and the Executive Committee of the Faculty Senate, for a prompt decision of the President or the 5.7. Final Disposition~~

~~In the absence of a timely appeal filed by either party from a decision of a Hearing Committee, or after a decision of the Dispute Resolution Committee, such decision shall be transmitted to the parties, to the Chair of the Executive Committee of the Faculty Senate, and to the Vice President for Academic Affairs. \*Capitalization indicates amendment by Faculty Senate 12/10/99~~

Board of Trustees.